Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SYLVIA EVANS, et al., Petitioners,

v.

CITY OF CHICAGO, Respondent.

BERTHA BALARK, et al., Petitioners,

v.

CITY OF CHICAGO, Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER BALARKS' PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the *en banc* majority decision which attributes a decision to an earlier panel that the panel itself was not empowered to make, conflicts with 28 U.S.C. §2106 and a long-standing principle of this Court that such decisions are not to be considered as precedent.

Whether the Court of Appeals' majority opinion vacating a consent decree based on a decision attributed to an earlier court, conflicts with the controlling decision of this Court in *Rufo v. Inmates of Suffolk County Jail* that a significant change in law must be established to warrant modification of a consent decree.

Whether a new "rule of law" mandating judicial determination of a probable violation of a substantial federal claim as a prerequisite to entry or enforcement of a consent decree conflicts with decisions of this Court encouraging cooperative settlements of constitutional litigation.

Whether current government officials are bound by consent decrees entered into by prior administrations.

Whether the citizenry in general is accorded third party rights to consent decrees that affect the operation of governmental bodies.

LIST OF PARTIES[1]

BERTHA BALARK

DANE BALARK

DANA BALARK

ANNE BALARK

[1] SYLVIA EVANS, whose case was consolidated with the Balark plaintiffs by order of the District Court on January 28, 1981 (App., *infra*, 113) files a separate Petition for Writ of Certiorari.

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PETITIONER BALARKS' PETITION FOR WRIT OF CERTIORARI

The Balark class[2] plaintiffs respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW[3]

The opinion of the Court of Appeals (*Evans III*) (App., *infra*, 1-23) is reported at 10 F.3d 474 (7th Cir. 1993) (en banc). The panel opinion (App., *infra*, 24) although vacated by the Court of Appeals on August 19, 1993, (App., *infra*, 133) contains important factual, analytical and procedural information and is referred to in the argument. App., *infra*, 24. It is reported at 995 F.2d 1393 (7th Cir. 1993). The opinion of the district court rendered July 25, 1991 (App., *infra*, 52), is unreported. The procedural history, which includes two prior Seventh Circuit opinions, prior district court opinions and a consent decree is explained in Proceedings Below, *infra*, starting at page 9.

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[2] The Balark class includes: "all persons in whose favor a final tort judgment in excess of $1,000.00 against the City of Chicago has been or will have been entered commencing with the fiscal year 1974 who have held their judgments without full satisfaction thereof for a period not greater than the end of the fiscal year in which the judgment was obtained." *Evans v. City of Chicago*, (*Evans I*) 689 F.2d 1289, 1291 n.7 (7th Cir. 1982) (App., *infra*, 113).

[3] The *Balark* plaintiffs file their petition separately from the *Evans* plaintiffs. The *Evans v. City of Chicago*, 77 C 4119 and *Balark et al. v. City of Chicago*, 79 C 1939 cases were consolidated by the district court on January 28, 1981. (App., *infra*, 113, *Evans I* at 1291) The cases were filed by different attorneys and in some respects proceeded on their own tracks even after they were consolidated. The respective counsel have been unable to agree upon a joint petition. Appendix references in this Petition are to the appendix filed by the *Evans* petitioners. The appendix is too voluminous to be bound to the Petition and was filed with the *Evans* plaintiffs' petition.

JURISDICTION

The Court of Appeals entered its judgment on November 24, 1993. App., *infra*, 135. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2106 (1982):

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Ill.Rev.Stat. ch. 85, §9-102:[4]

> A local public entity is empowered and directed to pay any tort judgment or settlement for which it or

[4] This statute was amended in 1986 and is now officially cited as 745 ILCS 10/9-102. The new statute has never been the subject of this litigation.

any employee is liable in the manner provided in this Article. A local public entity may make payments to settle or compromise a claim or action which has been or might be filed or instituted against it when the governing body or person vested by law or ordinances with authority to make overall policy decisions for such entity considers it advisable to enter into such a settlement or compromise.

Ill.Rev.Stat. ch. 85, §9-104:[5]

(a) If a local public entity does not pay the tort judgment or settlement during the fiscal year when it becomes final and if, in the opinion of its governing body, the unpaid amount of the tort judgment is not too great to be paid out of revenues for the ensuing fiscal year, the governing body shall pay a balance of the judgment during the ensuing fiscal year.

(b) If the local public entity does not pay the tort judgment or settlement during the fiscal year when it becomes final and its governing body is of the opinion that the unpaid amount of the judgment or settlement is so great that undue hardship will arise if the entire amount is paid out of the revenues for the ensuing fiscal year, the governing body shall pay the judgment or settlement, with interest thereon, in not more than 10 annual installments. Each payment shall be of an equal portion of the principal of the tort judgment or settlement. The governing body, in its direction, may prepay any one or more installment or any part of an installment.

Federal Rules of Civil Procedure, Rule 60(b)(5):

Relief from Judgment or Order.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion

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[5] This statute was amended in 1986 and is now officially cited as 745 ILCS 10/9-104. The new statute has never been the subject of this litigation.

> and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: * * * (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; * * *.

STATEMENT OF THE CASE

This case involves, in part, whether 28 U.S.C. §2106 proscribes a reviewing court from attributing a ruling to a prior panel on an issue that was not before that prior panel and was expressly not considered by that panel. This case also involves whether *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748 (1992), authorizes the complete erasure of a viable and working consent decree when the law underpinning one of two "federal" theories upon which it is based changes, (see §IA, *infra*) and where continued enforcement of the decree is neither illegal nor overly burdensome.[6] A third important question posed by this case is whether the plurality's formulation of a new "rule of law" (App., *infra*, 17) mandating a judicial determination of a probable violation of a substantial claim under federal law prior to the entry or enforcement of every consent decree affecting the operation of a governmental body conflicts with prior rulings of this court. Also important is whether one elected administration can bind subsequent administrations to consent decrees or contracts

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[6] "I also see no inequity at this time in continued enforcement of the decree. Chicago does not complain that compliance has now become onerous. . . ." (App., *infra*, 22) (*Evans III*, 10 F.3d at 485 (Flaum, J. dissenting)).

assuming no finding of fraud or other impropriety. Analysis of these questions will be aided by a description of the Respondent's practice and this litigation.

A. THE PETITIONERS, THE CITY AND THE DEBT OF SHAME[7]

The four named Petitioners (Bertha Balark, Dane Balark, Dana Balark, and Anne Balark) were victims of police abuse and sued the City of Chicago and several individual police officers in federal district court. The case was settled, but immediate efforts to collect their judgments were frustrated. The Balarks[8] were told that they were required to wait at the end of a line to get paid. In July, 1979, the "line" was 47 months long (App., *infra*, 111) unless you had "the political clout to jump the queue." App., *infra*, 2, *Evans III*, 10 F.3d at 475. Petitioners decided not to wait.

They filed a class action suit (May, 1979) alleging violations of federal (equal protection and due process) and state (statutory and Illinois constitutional) rights in the Respondent's manner and method of payment. App., *infra*, 19, *Evans III*, 10 F.3d at 483 (Cudahy, J. dissenting); and App., *infra* 101 (Consent Decree). The *Evans I* court[9] affirmed in part and reversed in part the district court's opinion. (Cited at *Evans v. City of Chicago*, 522 F. Supp.

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[7] This description was coined in a *Chicago Sun-Times* editorial of May 10, 1979, entitled "City's Debt of Shame." (Editorial attached as Exhibit A).

[8] Mrs. Evans (whose Petition is filed under separate cover) settled her wrongful death claim in 1976 in the midst of trial in state court. (App., *Evans I*, *infra*, 109).

[9] *Evans, et al. v. City of Chicago*, 689 F.2d 1286 (7th Cir. 1982). As previously noted, the *Balarks* and *Evans* cases were consolidated on January 28, 1981.

789 (N.D. Ill. 1980)). The *Evans I* court sustained Plaintiff's challenge to the City's practice on equal protection grounds. The cases then proceeded to discovery. While discovery was continuing, on May 31, 1984, the parties entered into a Consent Decree (App., *infra*, 93) settling the case except for damages and attorneys fees.

The Consent Decree (*Id.*) was divided into sections: Definitions (App., *infra*, 94), Introduction (App., *infra*, 95), Purposes of Consent Decree (App., *infra*, 99) and Terms of Settlement (App., *infra*, 100). The parties described the nature of the claims, what was being sought by Plaintiffs, the purposes of the Consent Decree and what was being compromised as follows:

> 1. The parties state that they are entering into this Consent Decree for the purpose of avoiding the further expense of protracted litigation over the matters resolved and decided by this Consent Decree. The parties intend this Consent Decree to fully and finally resolve the budgetary and equitable aspects of Plaintiffs' class complaint, reserving only plaintiffs' claims for damages and claims for attorneys' fees. All equitable and legal rights of the plaintiffs are merged into this Consent Decree unless otherwise specified.

App., *infra*, 99.

> 3. Plaintiffs understand, upon advice of counsel, and agree that except as otherwise provided herein, this Decree is a final and total settlement of all claims they now have or may have in the future, arising either directly or indirectly out of or related to Ill. Rev. Stat. 1981, ch. 85 §9-104 and Ill. Rev. Stat. 1981, ch. 24 §8-1-16, as well as under the United States and Illinois Constitutions, except for claims for damages and attorneys fees, as hereinafter specified; and that such finality is applicable to the defendants, the City of Chicago, and its officers, agents and employees.

App., *infra*, 101.

The damages portion of the case proceeded to trial resulting in a verdict for the Petitioners. The Respondent appealed and obtained a reversal including the holding of the court (*Evans II*, 873 F.2d 1007 (7th Cir. 1989), App., *infra*, 72) that the "Evans I [decision] was clearly erroneous in its conclusion that the City's practice of prioritizing tort judgments under $1,000 denied the Plaintiffs the equal protection of the laws." App., *infra*, 92, *Evans v. City of Chicago*, 873 F.2d 1007, 1018 (7th Cir.) *cert. denied*, 493 U.S. 956 (1990).

The *Evans II* court only considered the equal protection claim because the due process claim (which had been merged in the consent decree) was not before it. This is clear from the following passages from *Evans II*:

> "The Evans I court also discussed whether the City's practice deprived the plaintiffs of property without due process. *Evans I*, 689 F.2d at 1296-99. The court concluded that Illinois law created a right to prompt payment of a judgment in some circumstances. . . ."
>
> * * *
>
> "The importance of this due process finding is unclear. While the *Evans I* court found a deprivation, (citations omitted), the focus of *Evans I* and all subsequent litigation has been the alleged equal protection violations. The *Evans II* district court found no due process violations and the due process issue was not argued by the parties on this appeal."

App., *infra*, 80-81, *Evans II*, 873 at 1012 n.11.

and:

> "Our decision in *Evans I* was clearly erroneous in its conclusion that the City's practice of prioritizing tort judgments under $1,000 denied the plaintiffs the equal protection of the laws. *To that extent we overrule Evans I.* We find that the City's failure to establish a single order of payment of all judgment creditors did not violate equal protection."

App., *infra*, 92, *Id.* at 1018 (emphasis added).

The case was returned to the district court and, pursuant to the Respondent's Rule 60(b) motion, the consent decree was modified by amending those provisions which depended upon the equal protection claims. App., *infra*, 140-41.[10] The Respondent appealed. A panel of the Seventh Circuit affirmed the district court (2-1). App., *infra*, 24, *Evans v. City of Chicago*, 995 F.2d 1393 (7th Cir. 1993.) The Respondent petitioned the court for re-hearing *en banc* which was granted on August 19, 1993. App., *infra*, 133. In so doing, the panel opinion was vacated. *Evans*, 995 F.2d at 1406. The case was argued but not re-briefed. A widely divided court[11] reversed and vacated the decree with five of the eleven judges dissenting. In his dissent Judge Flaum, with whom Judge Kanne joined, made the following observations:

> This court repudiated the equal protection theory in *Evans II*, *but the due process theory was left intact.* Perhaps the majority is correct in speculating that the *Evans II* court was in no mood to sustain the due process claim had it the opportunity to pass on it.
>
> * * *
>
> In my opinion a colorable due process theory supported at least part of this decree when it was entered in 1984, and nothing in *Evans II* or any other case since alters that conclusion.

App., *infra*, 22, *Evans III*, 10 F.2d at 475 (Flaum, J. dissenting) (emphasis supplied).

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[10] The path wasn't quite as direct as the text describes although the ultimate result is accurate. The district court first vacated the consent decree (App., *infra*, 136-38) but after reconsidering its action reinstated the consent decree in part, (App., *infra*, 140-41) and modified the decree in part. The respondents appealed this modification.

[11] *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993). There are four opinions (plurality, concurring, and two dissents).

The questions presented focus on the viability of consent decrees in the future and the effect of the decision on thousands of consent decrees that are being enforced at this time. The importance of this case is not limited to the named or absent Petitioners in Chicago.

B. PROCEEDINGS BELOW

Evans I

The Balark Petitioners filed their class action suit in May, 1979 in the district court alleging both federal and state claims. The district court denied Respondents' (prior to the case reaching this stage there were other Respondents (App., *infra*, 95) who were dismissed in the Consent Decree (*Id.* at 100-01)) motion to dismiss and granted, in part, Petitioners' motion for summary judgment. App., *infra*, 113, *Evans I*, 689 F.2d at 1289.

The *Evans I* court concluded that, under Illinois law, a property right existed in these tort judgments, 689 F.2d at 1296-97 (App., *infra*, 125-26) but vacated the finding of a due process violation because the City had never invoked the particular statutory provision (§9-104(b)). 689 F.2d at 1298-99. On the other hand, the court sustained Petitioners' equal protection theory. 689 F.2d at 1299-1300, App., *infra*, 129-130. The *Evans I* court could "discern no rational basis for the City's challenged classification." *Id.* at 1300; *Id.* at 130.

Evans II

At trial on damages, additional evidence on equal protection violations was entered into evidence. Following a two week bench trial, the court found:

1. that the City did not pay tort judgments within the year in which the judgment was entered,
2. that the City did not pay tort judgments in 10 annual installments,

4. that the City did not pay tort judgments in accord with any state statute or municipal ordinance,[12] and
5. that the City made no attempt to adequately budget money to pay tort judgments over $1,000.

App., *infra*, 148-49. In short, the City simply "ignore[d] the requirements of law with regard to when [over $1,000] judgments should have been paid." *Id.* at 149.

In sum, the district court held that "there is no principled way in which one can arrive at the conclusion that a rational distinction can be made between the tort judgments owned by the petitioners in this case and other judgments to which the City gave preference on the various theories I have just discussed." App., *infra*, 160.

The City filed a timely appeal and sought review of both the district court findings and *Evans I*. The Court of Appeals reviewed the lengthy case history and the district court holdings, then addressed the law of the case doctrine and *Evans I*, and endeavored to determine if *Evans I* was "wrongly decided." *Evans II*, 873 F.2d at 1007, 1009-13; App. *infra*, 83-88.

The court examined *Evans I* and the City's justifications presented there. The court found them to not be "a civics textbook example of good government," 873 F.2d at 1015 (App., *infra*, 88) but determined that any delving into this equal protection claim would result in judicial

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[12] In fact, City of Chicago Municipal Ordinance 7-29 requires payment in order of entry:

> All judgments shall be paid in the order of the date of entry upon the records of the court; provided, that if after the comptroller has sent notice by registered mail to the judgment creditor or his attorney of record that such claim is ready for payment and such judgment creditor fails to present such judgment, with satisfaction piece, for payment within fifteen days, then judgments next in the order of entry shall be paid.

meddling into the legislative province. Based on this, the court reversed *Evans I* because it was "clearly erroneous". 873 F.2d at 1016, App., *infra*, 89.

The court also addressed the due process claim:

> There is some question as to what effect we must give to the due process language in *Evans I*. *See supra*, note 11. The district court in *Evans II*, while acknowledging the due process findings in *Evans I*, did not base its holding on any due process violation. The district court decided this case solely on equal protection grounds and damages were awarded on that basis alone. The parties to this appeal also did not raise any issue of due process. The due process claim has not survived to this stage of litigation.

873 F.2d at 1018 n.15, App., *infra*, 92.

After the proceedings in *Evans II* the case was remanded to the district court. Upon motion of the Respondent, pursuant to Rule 60(b)(5) to vacate the Consent Decree, the district court first granted the Respondent's motion (App., *infra*, 136) and then reconsidered it, granting the Respondent's motion in part only. App., *infra*, 140.

In its opinion granting Respondent's motion in part only, the district court made the following observations:

> The important thing for today's purposes regarding the holding of *Evans I* is that it was a denial of equal protection for the City to pay judgments of less than $1,000 ahead of those which were in excess of that amount. Some seven years later in *Evans II*, 873 F.2d 1007 (1989), the Court of Appeals overruled this holding of *Evans I*.

App., *infra*, 54.

> So I read *Evans II* as holding that there is no equal protection ground upon which the City can be compelled to budget adequate amounts of money to pay tort judgments within any period of time the court might hold is required.

> The reason we are here this afternoon . . . is that between *Evans I* and *Evans II*, the parties negotiated a consent decree. . . .

App., *infra*, 56-57.

> *Evans II* does not hold that these practices—namely, of not paying judgments in chronological order and failing to budget adequately—do not constitute denials of due process. *Not a word in* Evans II *so holds. That is a question that was settled by the parties in the Consent Decree.*

App., *infra*, 60 (emphasis added).

The district court concluded that "with the exception of the $1,000 judgment aspect of the consent decree, there is no basis on which the court should grant relief to the City under either Rule 60(b)(5) or Rule 60 (b)(6)." App., *infra*, 66. See also App., *infra*, 61. The Respondent moved to reconsider the court's ruling but was denied. App., *infra*, 142. The Respondent appealed[13] and on June 3, 1993 a panel of the seventh circuit affirmed 2-1. App., *infra*, 24, *Evans v. Chicago*, 995 F.2d 1393 (7th Cir.) (Vacated by order of the court granting re-hearing *en banc*.) App., *infra*, 133.

The panel decision carefully traced the *Evans I* litigation in the district and appellate courts (App., *infra*, 25-28), the Consent Decree and its terms (App., *infra*, 28-31), the *Evans II* district and appellate courts (App., *infra*, 31-33), and back again to the district court and the Respondent's appeal. App., *infra*, 33-35.

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[13] While this matter was pending on appeal this Court decided *Rufo*. The parties were able to include *Rufo* in their briefs and consequently the panel decision was an early appellate decision on the effects of *Rufo* on consent decrees in institutional reform litigation.

The three judge panel concluded that:

> This Court can find no competent basis for vacating the decree in its entirety and finds that Judge Grady's modification of the decree is a proper resolution of the conflict arising out of this Court's reversal of the equal protection holdings. Although the City argues that Ill. Rev. Stat. ch. 85, para. 9-104(a) can withstand both substantive and procedural due process challenges, the constitutionality of §9-104(a) is not properly before this Court. Furthermore, the City cannot now litigate an issue that was subsumed in the consent decree, which the City agreed was final and applicable to it. [citation omitted]

App., *infra*, 37-38.

The panel correctly observed that *Rufo* did not contemplate or authorize the wholesale overturning of consent decrees just because "it is no longer convenient to live with the terms of a consent decree." *Id.* at 39. *Rufo* requires that the decree be "no longer equitable" for it to be modified in the first instance, let alone vacated in toto. *Id.* The Court rejected the City's appeal to equity or hardship. *Id.* at 41-42.[14]

The Respondent moved for and obtained re-hearing *en banc*. App., *infra*, 133. The case was re-argued on September 8, 1993. Judge Easterbrook (who had dissented from the panel) authored the plurality opinion reversing the district court and incorrectly framed the issue as follows: "We meet en banc to consider whether a district court should require a unit of state or local government to abide by a consent decree that does not serve any federal interest. The answer is No, and the injunction based on the

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[14] The *en banc* court does not base its reversal on any hardship arguments or findings. App., *infra*, 17-18 (Ripple, J. concurring).

parties' agreement therefore must be vacated." *Evans III*, 10 F.3d at 475, App., *infra*, 1. The majority (Ripple, J. concurring) found the parties' agreement unsalvageable and not suitable for tailoring of any kind.[15]

The majority apparently dismisses the fact that the Consent Decree (which compromised all claims) was bottomed in "a colorable due process theory . . . when it was entered in 1984, and nothing in *Evans II* or any case since alters that conclusion." App., *infra* 22 (Flaum, J. dissenting).

REASONS FOR GRANTING THE PETITION

This Court is urged to grant certiorari to decide important issues, central to maintaining the viability of consent decrees as instruments to settle litigation. These issues include upholding the orderly development of the law and respecting principles of finality. If not reviewed by this Court, the federal courts are certain to be inundated by unprecedented numbers of post-judgment proceedings. There is a great risk of relitigating the merits of federal claims to satisfy a newly proclaimed "rule of law" announced by the plurality. This new "rule of law" mandates judicial determinations as a prerequisite to enforcement of every consent decree affecting the operation of a government body.

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[15] "Instead of borrowing in the market at 15%, or raising taxes, Chicago borrowed from its [tort] judgment creditors. . . . By 1979 plaintiffs without the political clout to jump the queue had to wait on average 47 months for payment." *Evans III*, 10 F.3d at 475, App., *infra* 2. With this short but succinct rendition of what brought the litigants to the courthouse, the Seventh Circuit opens the door to modify or vacate every consent decree even where no change in the law has occurred. [No appropriate court has passed on the Petitioners' due process or state law claims settled in the Consent Decree. App., *infra* 18-22 (Cudahy, J. dissenting).]

I.

The Majority Decision of the Divided En Banc Court of Appeals Conflicts With 28 U.S.C. §2106 and this Court's Opinion in *Rufo v. Inmates of Suffolk County Jail.*

A. A Decision Cannot Subsequently Be Attributed to an Appellate Panel that Did Not Have the Authority Under 28 U.S.C. §2106 to Make the Decision Itself.

The majority decision recognizes that plaintiffs brought this case on two distinct federal legal theories, equal protection and due process. It concedes that *Evans II* "addressed only the equal protection issue. . . ." App., *infra*, 18 (Ripple, J., concurring). It, however, believes "there can be little doubt that *Evans II* would have repulsed a due process argument had the plaintiffs presented it for decision." App., *infra*, 13. Based upon this, it vacates the entire Consent Decree because it concludes that *Evans II* changed the prevailing law on the due process issue.

The holding of the majority is that:

> [f]or the present, it is sufficient to conclude that this court's decision in [*Evans II*] changed the prevailing law to such a degree as to make further enforcement of the consent decree by the district court inappropriate under the standards set forth by the Supreme Court in *Rufo*. . . . Although *Evans II* addressed only the equal protection issue, that was the only issue tendered to the court on appeal by the plaintiffs. Certainly, as the plurality opinion points out, the merits of the due process argument, as presented in earlier stages of the litigation, could not have survived the holding of *Evans II* had it been presented for decision by the plaintiffs. Indeed, given the history of this litigation, it is fair to say that it did not survive. *See Evans II*, 873 F.2d at 1012 n.11. On this basis, I concur in the judgment of the court.

App., *infra*, 17-18 (Ripple, J., concurring).

The *Evans II* panel itself could not have decided the due process issue because it was not before it for review. Under 28 U.S.C. §2106 an appellate court has the authority to "affirm, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review. . ." The requirement that the judgment be before the court for review is jurisdictional. The equal protection holding of *Evans I* was before the *Evans II* court for review, but the due process issue was not. That issue had been settled and merged into the Consent Decree, a final judgment that was entered five years before *Evans II*. That final judgment was not appealed. As a final judgment, the Consent Decree is protected by principles of res judicata.

The majority has circuitously bestowed not only jurisdiction on the *Evans II* court (which it lacked) to decide a question that was not before it for review, but has attributed a decision to the *Evans II* panel which it did not make. By so doing, the majority opinion conflicts with 28 U.S.C. §2106.

B. A Court Cannot Decide "Questions that Lurk in the Record" of an Earlier Opinion and Deem that Opinion To Have Changed Prevailing Law.

Having attributed a decision to *Evans II*, the majority concludes that there was a change in decisional law significant enough to warrant vacatur of the Consent Decree. By so doing the majority opinion conflicts with *Rufo v. Inmates of Suffolk County Jail*, ____ U.S. ____, 112 S.Ct. 748 (1992) and other opinions of this Court.

It conflicts with *Rufo* in at least three significant ways. First, *Rufo* requires a party to meet an initial burden of showing a significant change in law in order to warrant modification of a consent decree. *Rufo*, 112 S.Ct. at 760.

The majority vacated the Consent Decree (including those provisions addressed to remedying the due process claim) in the absence of a significant change or clarification in the law affecting that claim.

Minimally, a significant change in law that may warrant modification of a consent decree requires a change in statutory or decisional law. "[M]odification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo*, 112 S.Ct. at 762.

Evans II is deemed to have changed the prevailing law, on the basis of the attributed decision. But *Evans II* neither changed nor clarified the law with respect to the due process claim. Comporting with 28 U.S.C. §2106, *Evans II* did nothing with the due process claim.[16]

This Court and lower courts have long adhered to the principle that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925) (citations omitted). *Accord, United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *KVOS, Inc. v. Associated Press*, 299 U.S. 269 (1936); *National Cable Television Ass'n. v. American Cinema Editors, Inc.*, 937 F.2d 1572, 1581 (Fed. Cir. 1991); *Soyka v. Alldredge*, 481 F.2d 303 (3d Cir. 1973).

"[A] decision of an appellate court becomes precedent only insofar as it determines some issue of law properly before it for review. . . . At the very least, the court must

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[16] *Evans II* repeatedly and explicitly states that it affects only the holding of *Evans I* on the equal protection claim. *Evans II* at 1012 n.11, 1013, 1015, 1016, 1018, 1018 n.15.

have heard and decided some issue of law." 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE, 0.402 [2] (2d ed. 1993). Even to consider broad language in cases on a point of law where the issue was not presented is regarded as "contrary to all traditions of our jurisprudence." *RAV v. City of St. Paul*, 112 S.Ct. 2538, 2545 n.5 (1992). As Judge Flaum states in his dissent, joined by Judge Kanne:

> This Court repudiated the equal protection theory in *Evans II*, but the due process theory was left intact. Perhaps the majority is correct in speculating that the *Evans II* court was in no mood to sustain the due process claim had it the opportunity to pass on it. However, I think it is a wiser practice to limit what we take from a case to what it in fact says, and not to attribute to cases penumbral holdings about wholly distinct and undecided legal theories.
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> In my opinion a colorable due process theory supported at least part of this decree when it was entered in 1984, and nothing in *Evans II* or any other case since alters that conclusion.

App., *infra*, 22.

The decision attributed by the majority to *Evans II* neither clarifies nor changes the law, "significantly," or otherwise, and cannot form the basis for vacating a consent decree under the standards set in *Rufo*.

C. *Rufo* Requires "Tailoring" of Consent Decree Modifications.

Second, the majority decision conflicts with *Rufo* by failing to focus on whether the modification ordered by the district court, and approved by the three judge panel of the Court of Appeals, with one judge dissenting, (App., *infra*, 24) was properly "tailored to resolve the problems created by the change in circumstances." *Rufo*, 112 S.Ct. at 764.

The "change of law" that initially merited modification of the Consent Decree was the overruling of the equal protection holding of *Evans I*. The district court, in charge of this case since 1977, modified the Consent Decree, freeing the City to prioritize payment of $1,000 and under judgments over larger ones. This was the sole basis upon which an equal protection violation had been held. This modification resolved the problem created by the change in law on equal protection.

Rufo explicitly announces the duty of lower courts to abide by this standard for modification while explaining the policy considerations which underlie it: "A court should do no more [in modifying a decree], for a consent decree is a final judgment that may be reopened only to the extent that equity requires." *Rufo*, 112 S. Ct. at 764. Instead of "tailoring" the modification to resolve the problems created by the change in law on equal protection, the majority violates the stricture of *Rufo* and vacates the entire decree.[17]

In addition, strong deference should be paid to the district court's exercise of discretion in modifying a decree. *Rufo*, 112 S.Ct. at 765 (O'Connor, J., concurring). The majority determined that any finding by the district court, after *Evans II* that plaintiffs have "a substantial claim under the due process clause . . . would have been legally erroneous." App., *infra*, 17. Somehow, by this reasoning, the district court abused its discretion because it failed to presage that the *en banc* majority would attribute a decision to *Evans II* on an issue it did not review.

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[17] Petitioners note that *Rufo* states that "modification of a consent decree *may* be warranted when the . . . decisional law has changed. . . ." *Rufo* at 762. (Emphasis added). Modification or vacatur is not required under this standard, contrary to the majority's conclusion.

The process engaged in here by the majority removes all discretion from the district court.

D. Vacatur Results in Likelihood of Creating Or Perpetuating a Constitutional Violation.

Finally, the majority failed to consider whether vacatur of the decree will "create or perpetuate a constitutional violation." *Rufo*, 112 S.Ct. at 763. The plurality notes that prior to entry of the decree "plaintiffs without the political clout to jump the queue had to wait, on average, 47 months for payment." App., *infra*, 2. As noted in the dissenting opinion by Judge Cudahy, joined by Judges Cummings and Rovner: "This practice ["jumping the queue"] alone may violate three or four constitutional provisions." App., *infra*, 21. The plurality also recognizes, yet brushes aside, the existence of a probable violation of the Supremacy Clause:

> Chicago's payment of contract before tort judgments may disfavor holders of federal judgments . . . which might offend the supremacy clause of the Constitution. . . . Plaintiffs do not pursue any of these claims based on the difference between federal and state judgments, however, and the difference could not support the full scope of the relief awarded in this case.

App., *infra*, 15-16.[18]

[18] Plaintiffs did not pursue these claims because they were settled and merged in the consent decree which states that it is "a final and total settlement of all claims [that the plaintiffs] now have or may have in the future, arising either directly or indirectly out of [the Illinois Code], as well as under the United States and Illinois Constitutions, except for claims for damages and attorneys fees." App., *infra*, 101.

E. The Question Presented Is Important.

The majority's new approach of ascribing holdings to earlier courts on issues not raised or decided, does an end run around 28 U.S.C. §2106 and does violence to long-standing principles of finality of judgments, stare decisis and the orderly development of the law. If left to stand, the majority holding would set the precedent, disallowed by this Court and other circuits, of permitting retrospective reviews of prior decisions in order to attribute holdings, otherwise not authorized under the statute, on issues that were never argued or decided.

Our tradition of jurisprudence is adversarial in nature. It permits parties to frame the issues presented to courts, to brief and argue them before the court and to rely upon the written decisions of courts as precedent. The majority holding of the *en banc* Seventh Circuit severely undermines this tradition. These rights become mere niceties, to be superseded by a court, retrospectively attributing decisions under the guise of reviewing Rule 60(b)(5) motions.

Consent decrees affecting the operation of a governmental body will now be subject to recurring litigation on the merits of constitutional claims as reviewing courts take second and third looks at prior decisions to proclaim how they believe courts in the past would have ruled on issues had they been raised. Such practice eviscerates the principle of finality of judgments. *Rufo* recognizes as much in its reaffirmation of the strong policy reasons for prohibiting abuse of Rule 60(b)(5) in regard to consent decrees. "To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation." *Rufo*, 112 S.Ct. at 763.

II.

The New "Rule of Law" Announced by the Plurality Conflicts with Principles of Law Long Upheld by This Court Encouraging Cooperative Settlements of Constitutional Litigation.

The plurality has announced a new "rule of law" (App., *infra*, 12-13) which imposes an extraordinary and unprecedented burden on parties seeking to enter or enforce consent decrees affecting the operation of governmental bodies. This new "rule of law" mandates judicial determination of a probable violation of a substantial claim under federal law prior to entry or enforcement of every consent decree affecting the operation of a governmental body.

A. The Plurality Opinion Ignores the Fact that Current Government Officials Are Bound by a Consent Decree Entered into by a Prior Administration and Must Make the Same Showing for Relief from that Decree As Required by Any Party Under the *Rufo* Standards.

The plurality's new "rule of law" has emerged by combining the following asserted principles:

(1) Courts considering requests to enforce consent decrees must "preserve the maximum leeway for democratic governance. . . ." App., *infra*, 9, 16. This principle imposes an obligation on the court to "permit new public officials to set their own policy within the limits established by federal law" even if their predecessors agreed to something else in a decree. App., *infra*, 9.

(2) "New public officials" are entitled to this unprecedented reevaluation of consent decrees because, the plurality asserts, the City did not consent and was not really a party to the decree. " 'Chicago' did not reach a settlement with the plaintiffs. . . ." It was merely a prior ad-

ministration that settled the case.[19] App., *infra*, 7-8. The plurality describes this as the "most potent" objection to enforcing the decree. App., *infra*, 7.

There is no basis in law or policy for this view, which turns official capacity and municipal liability on its head, and has a perverse effect on the very principles of federalism which the plurality proclaims to uphold. The dissenting opinion of Judges Cudahy, Cummings and Rovner states it well: "the plurality has put in grave doubt the value of these devices for dispute resolution. In fact, the plurality opinion effectively deprives state and local governments of the ability to enter into enforceable consent decrees." App., *infra*, 19.

(3) In arriving at its new "rule of law," the plurality imposes principles that heretofore have applied *only* to cases in which consent decrees directly affected contractual rights of non-parties—such as overriding collective bargaining agreements—or where enforcement of provisions of a decree directly violated the established rights of third parties.

The plurality sweepingly extends third party rights to other creditors ("[s]omeone else must wait for payment") and to taxpayers and the citizenry in general ("alternatively, the City must raise taxes (or cut back on other things, such as police or education to pay all creditors immediately"). App., *infra*, 12.

This abstract, generalized grievance is devoid of any judicially cognizable injury. In order to be the basis for vacating or blocking entry of a decree, there has to be

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[19] This is a remarkable assertion given that the City of Chicago is a party to this decree and that the decree was signed by a public official (the City Corporation Counsel).

some demonstrable injury analogous to a standing requirement. *Conservation Law Foundation of New England, Inc. v. Franklin*, 989 F.2d 54 (1st Cir. 1993). "An appealable order may not . . . be challenged by the world at large. . . ." *United States v. City of Miami*, 664 F.2d 435, 445 (11th Cir. 1981) (*en banc*).

There is simply no precedent for extending legal rights to strangers in so sweeping a manner on any basis, let alone that the City's budgetary process is impacted to some extent by the decree. Every commitment undertaken by a municipality impacts upon its budget. When it contracts to build a structure, it commits future administrations to budgeting funds to maintain the structure in the future. At any rate, the City does not complain that compliance with the decree has proven onerous in any fashion. The City's debt is not increased by this Decree. The City is simply required to pay their debt in a timely manner.

B. The New "Rule of Law" Prohibits Voluntary Settlements of the Merits of a Case While Imposing an Unprecedented Stringent Standard in Order to Enter or Enforce a Consent Decree.

This new rule directly conflicts with principles of law governing consent decrees as recognized by this Court. By mandating judicial determination of a probable violation of a substantial federal claim, the plurality prohibits parties from voluntarily compromising the merits of a claim to avoid the time, expense and uncertainty of litigation (the desire to minimize the risk concerning the applicable legal standard). Yet, parties have always been free to compromise the merits of a case.

In *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971), this Court provided the following analysis. "Consent decrees are entered into by parties . . . after careful

negotiation. . . . The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense and inevitable risk of litigation." *See Local No. 93, International Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 522-23 (1986), and cases cited therein. (The voluntary nature of a consent decree is its most fundamental characteristic. The parties agreement, rather than force of the law upon which the complaint was based creates the obligations embodied in decree).

This Court has long upheld the value to society of achieving voluntary compliance with the law over imposing judicial determinations as a prerequisite to remedial action. Parties have been permitted maximum freedom to bargain in order to promote settlement. *See Evans v. Jeff D.*, 475 U.S. 717, 732 (1986) (general proscription against waiver of attorneys fees in negotiated settlement would impede vindication of civil rights by reducing attractiveness of settlement). *See Id.*, at 760 n.15 (Brennan, J., dissenting) ("[b]y lessening docket congestion, settlements make it possible for the judicial system to operate more efficiently and more fairly while affording plaintiffs an opportunity to obtain relief at an earlier time."); *See, also, Marek v. Chesny*, 473 U.S. 1, 10 (1985). The plurality's new rule negates the contractual aspect of a consent decree.

Under the plurality's new principle, the existence of a legally cognizable or "colorable" constitutional claim is no longer sufficient to enter a consent decree or require a party to comply with a settlement to which it agreed. The claim must be judicially determined as being "substantial." App., *infra*, 17.

The new rule's stringent standard, although undefined, appears minimally to put plaintiffs to a test analogous to that required for entry of a preliminary injunction. The long-standing rule, however, is that a district court has

the power to enter a consent decree without first determining that a violation of federal law has occurred. *Swift & Co. v. United States*, 276 U.S. 311, 327 (1928).

C. The Question Presented Is Important.

In *Ackermann v. United States*, 340 U.S. 193, 198 (1950), this Court stated "[t]here must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." The plurality now carves out a large exception to this principle of finality by treating the entry and enforcement of a consent decree as a springboard for further litigation.

The practical effect of this opinion goes far beyond this particular case. As an opinion emanating from an *en banc* Court of Appeals, it will be accorded wide-ranging application and deference, as lower courts seek guidance in applying *Rufo* to an area of changing and developing law, namely modification of consent decrees in institutional reform litigation.[20] *Rufo*, however, did not overrule earlier opinions of this Court that defined the principles of law governing consent decrees. It is not a green light to relitigate the merits of all decrees that affect governmental bodies.

Under the plurality's new rule, every consent decree would automatically require relitigation of the merits, and an independent judicial determination of a constitutional

[20] It must also be noted that in the Circuit itself, which hears cases in panels of three, the five members who make up the plurality will often make up the majority of a panel. It is thus a certainty that this new rule of law will become the unquestioned law of the Circuit. This is likely to cause swift inundation of the lower courts with post-judgment proceedings and put the state of hundreds of consent decrees, affecting thousands of citizens, into serious question.

claim by the federal courts, every time a party seeks enforcement of a decree. Expressing its disapproval of precisely such a procedure which "automatically" opens the door for relitigation of the merits of consent decrees, and recognizing the deleterious effect this would have on the future of negotiated settlements of institutional reform litigation, this Court in *Rufo* stated: " 'Procedurally, it would make necessary . . . a constitutional decision every time an effort was made either to enforce or modify the decree by judicial action.' *Plyler v. Evatt*, 924 F.2d 1321, 1327 (4th Cir. 1991)." *Rufo*, at 763.

Adoption of the plurality's principle immediately calls into question the continued validity of thousands of final judgments now entered in the courts. At a time of unprecedented burgeoning caseloads, federal courts will become overwhelmed by required post-judgment proceedings. Cases in which the operation of a governmental body are affected, even minimally, (as in the instant case) will be in perpetual litigation. Failure to comply with a decree (which is a court order) now brings the reward of giving the non-complying party another opportunity to litigate the merits. Defendants will be encouraged to enter into consent decrees as a means of postponing litigation on the merits until a time they perceive to be more opportune and politically expedient.

The dissenting opinion of Judges Cudahy, Cummings and Rovner sums up the effect of this new "rule of law" accurately. "It is more like a rule of anarchy. The solemn promises of governments bind only for the day. They are not to be taken seriously with the turnover of city fathers (not to mention the advent of new faces on the federal courts)." App., *infra*, 22.

CONCLUSION

The petition for a writ of certiorari should be granted.

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EXHIBIT A

Sun-Times
Thursday, May 10, 1979 Page 65 **Editorials**

City's debt of shame

If your concrete company were hired to tear up Wacker Dr. and put it back together again, you'd expect the city to pay when you sent your bill. And the city would.

If your plowing company were hired to get snow off the city streets, you'd expect the city to pay when you sent your bill. And the city would. (Perhaps even if you didn't lift a flake, or so it appears.)

But if you were hurt because of city negligence and a court, in effect, sent a bill to the city—you wait. No money. Four or more years may go by. Inflation will shrink the amount of the award. Still no money.

Sun-Times writer James Warren, who uncovered this arrogant, cynical city brushoff of people it has injured, reports that some victims are so desperate they sell their judgments to brokers at a 20 per cent discount.

City officials insist the problem is a state law forbidding them from paying more than $4.5 million a year in judgments. As 1978 ended, there was a backlog of $14.8 million against that $4.5 million, producing waits of four years or longer. And, of course, the wait lengthens as judgments pile up.

But, according to attorneys who have studied the matter, the city is deliberately misinterpreting that law.

In the Illinois Statutes, Ch. 24, Sec. 8-1-16, Chicago is empowered to levy a "tax to pay judgments" that can produce no more than $4.5 million a year. If such a tax is levied, "judgments against the municipality shall be paid out of this fund in the order in which the judgments were obtained."

All this statute does is limit the amount that can be collected from a special judgments tax. It does not prohibit the city from using its general revenues to pay court-ordered judgments.

By distorting this law to suit its own purpose, the city is violating another law, as U.S. District Court Judge John F. Grady has noted. In ruling earlier this month, he cited Ch. 85, Sec. 9-102 of the state statutes, which orders a municipality to pay any tort (personal injury) judgment in the year in which the judgment becomes final.

The lawyer for a widow who has waited three years for the money she was awarded after her husband was killed—only $67,500—is considering a class action suit on behalf of everyone the city owes.

But, as Mayor Byrne learns about this matter, that shouldn't be necessary. The city should pay this shameful debt to the people it has wronged.